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[H.R. 2745, Standard Merger and Acquisition Reviews Through Equal Rules \(SMARTER\) Act of 2015](#)

FLOOR SITUATION

On Wednesday, March 23, 2016, the House will complete consideration of [H.R. 2745](#), the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2015, under a [closed rule](#). H.R. 2745 was introduced on June 12, 2015, by Rep. Blake Farenthold (R-TX) and was referred to the Committee on Judiciary, which ordered the bill reported by a vote of 18 to 10 on September 30, 2015.

SUMMARY

H.R. 2745 would amend the Clayton Act and the Federal Trade Commission Act to align certain procedures followed by the Federal Trade Commission (FTC) when it reviews a proposed merger or acquisition with the procedures followed by the Department of Justice (DOJ). The bill also provides the FTC with the same authority DOJ already possesses to seek an injunction against a proposed merger in Federal court; therefore, removes the ability of the FTC to pursue internal administrative litigation following a court's denial of an FTC preliminary injunction request. H.R. 2745 does not inhibit either agency's authority to challenge monopolistic transactions or ones that would substantially lessen competition.¹

BACKGROUND

Two federal agencies, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission, share responsibility for the enforcement of federal antitrust laws. These laws generally promote marketplace competition and protect consumers from anticompetitive mergers and business practices.

Congress passed the first antitrust law, the Sherman Act, in 1890 to prohibit certain anticompetitive business activities and require the government to investigate and pursue trusts. In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and

¹ See [House Report 114-449](#) at 2.

the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.²

Section 7 of Clayton Act prohibits mergers and acquisitions that would “substantially lessen competition” or “tend to create a monopoly.”³ “The DOJ and the FTC have essentially identical authority to enforce such provisions. When the antitrust enforcement agencies conclude that the consummation of a proposed transaction would violate Section 7, the agencies pursue an injunction of the transaction in Federal court. Generally speaking, if the court grants the injunction, the parties abandon the merger; if the court denies the injunction, the parties consummate the transaction shortly thereafter.”⁴

“The FTC and DOJ confront different standards when seeking a preliminary injunction of a proposed transaction in court.”⁵ When reviewing the FTC’s request for a preliminary injunction, courts apply the standard explicitly set forth in Section 13(b) of the FTC Act.⁶ By comparison, Section 15 of the Clayton Act, pursuant to which DOJ seeks injunctions, does not specify a standard of review; therefore, DOJ must meet the traditional preliminary injunction standard. These disparate preliminary injunction standards can yield different results.⁷

In a report issued by the bi-partisan Antitrust Modernization Commission, they recommended that, “Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger. A divergence undermines the public’s trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. The importance of removing any potential divergence is underscored by the fact that it often is mere chance or, the ‘flip of a coin,’ that determines which agency reviews the proposed transaction.”⁸

Additionally, in contrast to the DOJ, the FTC’s sometimes only seeks a preliminary injunction in such proceedings, in order to preserve their right to pursue administrative litigation following the denial of a preliminary injunction request. When the FTC seeks to prevent the consummation of a proposed transaction, it will file simultaneously an administrative complaint that initiates the administrative litigation process, in an attempt to preclude the parties from closing the transaction while the administrative litigation is pending.⁹

H.R. 2745 aligns the standards applied to the Department of Justice (DOJ) and the Federal Trade Commission (FTC) and removes the ability of the FTC to pursue internal administrative litigation following a court’s denial of an FTC preliminary injunction request.

² See Federal Trade Commission Website, [The Antitrust Laws](#)

³ The Clayton Act, Section 7 [P.L. 63-212](#)

⁴ See [House Report 114-449](#) at 2.

⁵ Id. at 3.

⁶ Federal Trade Commission Act, [Section 13\(b\)](#)

⁷ See [House Report 114-449](#) at 3.

⁸ See Antitrust Modernization Commission, [Report and Recommendations](#), April 2007 at 138.

⁹ See [House Report 114-449](#) at 3.

COST

The Congressional Budget Office (CBO) [estimates](#) that enacting H.R. 2745 would not have a significant effect on discretionary spending and would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

STAFF CONTACT

For questions or further information please contact [John Huston](#) with the House Republican Policy Committee by email or at 6-5539.